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HOUSE BILL 282

43RD LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 1998

INTRODUCED BY

RAYMOND G. SANCHEZ

AN ACT

RELATING TO COMMERCIAL LAW; AMENDING THE DEFINITION OF LIMITED LIABILITY COMPANY; PROVIDING AN EXEMPTION FOR CERTAIN SECURITIES TRANSACTIONS; AMENDING SECTIONS OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 53-19-2 NMSA 1978 (being Laws 1993, Chapter 280, Section 2) is amended to read:

"53-19-2. DEFINITIONS. -- As used in the Limited Liability Company Act:

A. "articles of organization" means the original or restated articles filed pursuant to the Limited Liability Company Act and any amendments to those articles, including articles of merger or consolidation;

B. "corporation" means an organization incorporated under the laws of New Mexico or a foreign

1 corporation;

2 C. "commission" means the state corporation
3 commission or its designee;

4 D. "court" means a court having jurisdiction in
5 the case;

6 E. "event of dissociation" means an event that
7 causes a person to cease to be a member of a limited liability
8 company;

9 F. "foreign corporation" means a corporation that
10 is organized under the laws of another state or a foreign
11 country;

12 G. "foreign limited liability company" means an
13 entity that is:

14 (1) an unincorporated association;
15 (2) organized under the laws of another state
16 or foreign country;

17 (3) organized under a statute pursuant to
18 which an association may be formed that affords to each of its
19 members limited liability with respect to the liabilities of
20 the entity; and

21 (4) is not required to be registered or
22 organized under the laws of New Mexico other than the Limited
23 Liability Company Act;

24 H. "foreign limited partnership" means a limited
25 partnership formed under the laws of another state or a

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1 foreign country;

2 I. "limited liability company" or "domestic
3 limited liability company" means an unincorporated
4 organization of one or more persons formed pursuant to the
5 provisions of the Limited Liability Company Act;

6 J. "limited liability company interest" means a
7 member's or assignee's right to receive distributions and a
8 return of capital from the limited liability company. A
9 member's or assignee's limited liability company interest does
10 not include rights the member or assignee has on account of
11 other matters, such as a right to receive accrued salary for
12 services the member or assignee rendered to, repayment of a
13 loan the member or assignee made to or indemnification by the
14 limited liability company;

15 K. "limited partnership" means a limited
16 partnership under the laws of New Mexico or a foreign limited
17 partnership;

18 L. "manager" means, with respect to a limited
19 liability company that has included a statement in its
20 articles of organization that it is to be managed by a manager
21 [~~or managers~~], the person [~~or persons~~] designated as
22 [~~managers~~] manager in accordance with the articles of
23 organization or an operating agreement;

24 M "member" means a person who has been admitted
25 to membership in a limited liability company and who has not

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1 dissociated from that company;

2 N. "membership interest" or "interest" means a
3 member's limited liability company interest and his rights to
4 participate in management and control of the limited liability
5 company;

6 O. "operating agreement" means a written agreement
7 providing for the conduct of the business and affairs of a
8 limited liability company and that agreement as amended in
9 writing;

10 P. "person" means an individual, a general
11 partnership, a limited partnership, a domestic or foreign
12 limited liability company, a trust, an estate, an association,
13 a corporation or any other legal entity; and

14 Q. "state" means a state, territory or possession
15 of the United States, the District of Columbia or the
16 commonwealth of Puerto Rico. "

17 Section 2. Section 58-13B-27 NMSA 1978 (being Laws 1986,
18 Chapter 7, Section 27, as amended by Laws 1993, Chapter 280,
19 Section 80 and also by Laws 1993, Chapter 323, Section 1) is
20 amended to read:

21 "58-13B-27. EXEMPT TRANSACTIONS.--The following
22 transactions are exempted from Section 58-13B-20 NMSA 1978
23 and, unless otherwise noted, Section 58-13B-29 NMSA 1978:

24 A. an isolated non-issuer transaction, whether or
25 not effected through a broker-dealer;

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1 B. a non-issuer transaction in a security by a
2 registered broker-dealer if:

3 (1) the issuer of the security has a class of
4 securities required to be registered under Section 12 of the
5 Securities Exchange Act of 1934;

6 (2) the issuer has filed reports pursuant to
7 Section 13 or Section 15(d) of the Securities Exchange Act of
8 1934 during the ninety-day period immediately preceding the
9 date of the offer or sale or is an issuer of a security
10 covered by Section 12(g) (2) (B) or (G) of that 1934 act;

11 (3) the broker-dealer has a reasonable basis
12 for believing that the issuer is current in filing the reports
13 required to be filed at regular intervals pursuant to the
14 provisions of Section 13 or Section 15(d), as the case may be,
15 of the Securities Exchange Act of 1934 or in the case of
16 insurance companies exempted from Section 12(g) of the
17 Securities Exchange Act of 1934 by Subparagraph 12(g) (2) (G)
18 thereof, the annual statement referred to in Section
19 12(G) (2) (G) (i) of the Securities Exchange Act of 1934; and

20 (4) the broker-dealer has in its records, and
21 makes reasonably available upon request to any person
22 expressing an interest in a proposed transaction in the
23 securities, the issuer's most recent annual report filed
24 pursuant to Section 13 or 15(d), as the case may be, of the
25 Securities Exchange Act of 1934 or the annual statement in the

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1 case of an insurance company exempted from Section 12(g) of
2 the Securities Exchange Act of 1934 by Subparagraph
3 12(G) (2) (G) thereof, together with any other reports required
4 to be filed at regular intervals under the Securities Exchange
5 Act of 1934 by the issuer after such annual report or annual
6 statement; provided that the making available of such reports
7 pursuant to this paragraph, unless otherwise represented,
8 shall not constitute a representation by the broker-dealer
9 that the information is true and correct but shall constitute
10 a representation by the broker-dealer that the information is
11 reasonably current; or

12 (5) the issuer has filed and maintained with
13 the director, for not less than ninety days before the
14 transaction, information in such form as the director by rule
15 specifies, substantially comparable to the information which
16 the issuer would be required to file under Section 12(b) or
17 Section 12(g) of the Securities Exchange Act of 1934 were the
18 issuer to have a class of its securities registered under
19 Section 12 of the Securities Exchange Act of 1934, and under
20 either Subparagraph (1) or (2), the issuer has paid a fee of
21 five hundred dollars (\$500);

22 C. a non-issuer transaction in a security:

23 (1) of a class outstanding in the hands of
24 the public for not less than one hundred eighty days before
25 the transaction if a nationally recognized securities manual

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1 designated by the director by rule or order contains the names
2 of the issuer's officers and directors, a statement of
3 financial condition of the issuer as of a date within the last
4 eighteen months and a statement of income or operations for
5 either the last fiscal year before the date or the most recent
6 year of operation; or

7 (2) if the security has a fixed maturity or a
8 fixed interest or dividend provision and there has been no
9 default during the current fiscal year or within the three
10 preceding years, or during the existence of the issuer and any
11 predecessors if less than three years, in the payment of
12 principal, interest or dividends on the security; provided
13 that the director may impose additional requirements as a
14 condition of the exemption established in this paragraph as
15 necessary for the protection of investors and shall promulgate
16 rules specifying application of this exemption;

17 D. any non-issuer transaction effected by or
18 through a registered broker-dealer registered in this state
19 pursuant to an unsolicited order or offer to buy; provided
20 that the director by rule shall require that the broker-dealer
21 have the customer acknowledge upon a specified form that the
22 sale was unsolicited and that a signed copy of that form be
23 preserved by the broker-dealer for a specified period;

24 E. a transaction between the issuer or other
25 person on whose behalf the offering of a security is made and

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1 an underwriter or a transaction among underwriters;

2 F. a transaction in a bond or other evidence of
3 indebtedness secured by a real estate mortgage, deed of trust,
4 personal property security agreement or by an agreement for
5 the sale of real estate or personal property, if the entire
6 mortgage, deed of trust or agreement, together with all the
7 bonds or other evidences of indebtedness secured thereby, is
8 offered and sold as a unit;

9 G. a transaction by an executor, administrator,
10 sheriff, marshal, receiver, trustee in bankruptcy, guardian or
11 conservator;

12 H. a transaction executed by a bona fide secured
13 party without a purpose of evading the New Mexico Securities
14 Act of 1986;

15 I. an offer to sell or sale of a security to a
16 financial or institutional investor or to a broker-dealer;

17 J. the issuance and offer and sale of securities
18 by any corporation [~~organized under the laws of this state~~] or
19 limited liability company or any offer or sale of limited
20 partnership interests by a limited partnership [~~organized or~~
21 ~~to be organized under the laws of this state~~] if:

22 (1) in the case of a corporation or limited
23 liability company, its principal office and a majority of its
24 full-time employees are located in this state or, in the case
25 of a limited partnership, its principal place of business and

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1 eighty percent of its assets are located in this state;

2 (2) at least eighty percent of the proceeds
3 from the offering shall be used by the issuer in operations of
4 the issuer in this state;

5 (3) no commission or other remuneration is
6 paid or given, directly or indirectly, for soliciting or
7 selling to any person in this state except to broker-dealers
8 and sales representatives licensed pursuant to the New Mexico
9 Securities Act of 1986;

10 (4) an offering document is delivered to each
11 purchaser or prospective purchaser prior to the sale of the
12 securities disclosing such information as the director by rule
13 or order may require;

14 (5) the total offering, including interest on
15 installment payments, does not exceed one million five hundred
16 thousand dollars (\$1,500,000); and

17 (6) the issuer claiming this exemption files
18 notice with the director on a form prescribed by the director
19 prior to the first offer and pays a fee of three hundred fifty
20 dollars (\$350). The director may require any issuer using
21 this exemption to file periodic reports not more often than
22 quarterly to keep reasonably current the information contained
23 in the notice and to disclose the progress of the offering.
24 The director may impose conditions by rule or order with
25 respect to issuers, broker-dealers or affiliates who by reason

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1 of prior misconduct will not be eligible to utilize this
2 exemption. The issuance and offer and sale of securities
3 pursuant to this subsection shall be subject to Section
4 58-13B-29 NMSA 1978;

5 K. the issuance and offer and sale of securities
6 by any corporation [~~organized under the laws of this state~~] or
7 limited liability company or any offer or sale of limited
8 partnership interests by a limited partnership [~~organized or~~
9 ~~to be organized under the laws of this state~~] if:

10 (1) in the case of a corporation or limited
11 liability company, the total number of security holders does
12 not and will not in consequence of the sale exceed twenty-five
13 or, in the case of a limited partnership, the number of
14 limited partners does not and will not in consequence of the
15 sale exceed twenty-five;

16 (2) the issuer reasonably believes that all
17 buyers are purchasing for investment;

18 (3) no public advertising or general
19 solicitation is used in connection with the offer or sale; and

20 (4) no commission or other remuneration is
21 paid or given, directly or indirectly, for soliciting or
22 selling to any person in this state except to broker-dealers
23 and sales representatives licensed pursuant to the New Mexico
24 Securities Act of 1986.

25 The director by rule or order may impose additional

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1 requirements as a condition of the exemption established in
2 this subsection as necessary for the protection of investors
3 and to specify its application. Any notice filing that may be
4 imposed pursuant to Subsection C of Section 58-13B-28 NMSA
5 1978 shall not be deemed a condition of this exemption;

6 L. any offer or sale of a preorganization
7 certificate or subscription if:

8 (1) such sale or offer is made by an agent,
9 the agent shall be licensed pursuant to the New Mexico
10 Securities Act of 1986. No commission shall be paid to an
11 agent not licensed pursuant to that act;

12 (2) no public advertising or general
13 solicitation is used in connection with the offer or sale;

14 (3) the number of subscribers does not exceed
15 ten; and

16 (4) either no payment is made by any
17 subscriber or any payment made by a subscriber is put into
18 escrow until the entire issue is subscribed;

19 M an offer or sale of a preorganization
20 certificate or subscription agreement issued in connection
21 with the organization of a depository institution if that
22 organization is under the supervision of an official or agency
23 of any state or of the United States which has and exercises
24 the authority to regulate and supervise the depository
25 institution. For the purpose of this subsection, supervision

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1 of an organization by an official or agency means that the
2 official or agency by law has authority to:

3 (1) require disclosures to prospective
4 investors similar to that required under Section 58-13B-23
5 NMSA 1978;

6 (2) impound proceeds from the sale of
7 preorganization certificates or subscription agreements until
8 organization of the depository institution is completed; and

9 (3) require a refund to investors if the
10 depository institution does not obtain a grant of authority
11 from the appropriate official or agency except that the
12 official or agency with the authority to require a refund need
13 not include such amounts as the official or agency has by law
14 determined to be proper organizational expenditures;

15 N. a transaction pursuant to an offer to sell to
16 existing security holders of the issuer, including persons who
17 at the time of the transaction are holders of transferable
18 warrants exercisable within not more than ninety days of their
19 issuance, convertible securities or nontransferable warrants,
20 if:

21 (1) no commission or other similar
22 compensation, other than a standby commission, is paid or
23 given, directly or indirectly, for soliciting a security
24 holder in this state; or

25 (2) the issuer first files a notice

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1 specifying the terms of the offer and the director does not by
2 order disallow the exemption within the next five full
3 business days;

4 0. a transaction involving an offer to sell, but
5 not a sale, of a security not exempt from registration under
6 the Securities Act of 1933 if:

7 (1) a registration or offering statement or
8 similar document as required under the Securities Act of 1933
9 has been filed but is not effective;

10 (2) a registration statement has been filed
11 under the New Mexico Securities Act of 1986 but is not
12 effective; and

13 (3) no stop order has been entered by the
14 director, the securities and exchange commission or other
15 state's securities agency, and no proceeding or examination
16 that may culminate in that kind of order is pending;

17 P. a transaction involving an offer to sell, but
18 not a sale, of a security exempt from registration under the
19 Securities Act of 1933 if:

20 (1) a registration statement has been filed
21 under the New Mexico Securities Act of 1986 but is not
22 effective; and

23 (2) no stop order has been entered by the
24 director, other state securities agencies or the securities
25 and exchange commission and no proceeding or examination that

Underscored material = new
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1 may culminate in that kind of order being issued by the
2 director is pending;

3 Q. a transaction involving the distribution of the
4 securities of an issuer to the security holders of another
5 person in connection with a merger, consolidation, exchange of
6 securities, sale of assets or other reorganization to which
7 the issuer, or its parent and subsidiary, and the other
8 person, or its parent or subsidiary, are parties, if:

9 (1) the securities to be distributed are
10 registered under the Securities Act of 1933 and written notice
11 of the transaction is given to the director prior to the
12 consummation of the transaction; or

13 (2) if the securities to be distributed are
14 not required to be registered under the Securities Act of
15 1933, and written notice of the transaction and a copy of the
16 materials, if any, by which approval of the transaction will
17 be solicited is given to the director at least ten days before
18 the consummation of the transaction and the director does not
19 disallow by order the exemption within the next ten days;

20 R.

21 (1) a transaction involving the offer to sell
22 or sale of one or more promissory notes each of which is
23 directly secured by a first lien on a single parcel of real
24 estate, or a transaction involving the offer to sell or sale
25 of participation interests in the notes if the notes and

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1 participation interests are originated by a depository
2 institution and are offered and sold subject to the following
3 conditions:

4 (a) the minimum aggregate sales price
5 paid by each purchaser may not be less than two hundred fifty
6 thousand dollars (\$250,000);

7 (b) each purchaser must pay cash either
8 at the time of the sale or within sixty days after the sale;
9 and

10 (c) each purchaser may buy for that
11 person's own account only;

12 (2) a transaction involving the offer to sell
13 or sale of one or more promissory notes directly secured by a
14 first lien on a single parcel of real estate or participation
15 interests in the notes, if the notes and participation
16 interests are originated by a mortgagee approved by the
17 secretary of housing and urban development under Sections 203
18 and 211 of the National Housing Act and are offered or sold,
19 subject to the conditions specified in Paragraph (1) of this
20 subsection, to a depository institution or insurance company,
21 the federal home loan mortgage corporation, the federal
22 national mortgage association or the government national
23 mortgage association;

24 (3) a transaction between any of the persons
25 described in Paragraph (2) of this subsection involving a

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1 nonassignable contract to buy or sell the securities described
2 in Paragraph (1) of this subsection, which contract is to be
3 completed within two years, if:

4 (a) the seller of the securities
5 pursuant to the contract is one of the parties described in
6 Paragraph (1) or (2) of this subsection who may originate
7 securities;

8 (b) the purchaser of securities
9 pursuant to any contract is any other institution described in
10 Paragraph (2) of this subsection; and

11 (c) the three conditions described in
12 Paragraph (1) of this subsection are fulfilled;

13 S. any transaction involving leases or interests
14 in leases in oil, gas or other mineral rights between parties
15 each of whom is engaged in the business of exploring for or
16 producing oil and gas or other valuable minerals as an ongoing
17 business. For purposes of this subsection, a party "engaged
18 in the business of exploring for or producing oil and gas or
19 other valuable minerals as an ongoing business" means:

20 (1) any corporation, limited liability
21 company, partnership or other business entity that is directly
22 engaged in and derives at least eighty percent of its annual
23 gross income from the exploration or production of oil, gas or
24 other valuable minerals;

25 (2) any general partner or any employee who

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1 spends at least eighty percent of his work time in the daily
2 management of a business entity that is directly engaged in
3 and derives at least eighty percent of its gross annual income
4 from the exploration or production of oil, gas or other
5 valuable minerals; or

6 (3) any corporation, limited liability
7 company, partnership or other business entity that is directly
8 engaged in the business of exploration and production of oil,
9 gas or other valuable minerals and derives at least five
10 million dollars (\$5,000,000) of annual gross income from such
11 business; [~~and~~]

12 T. any transaction involving the sale or offer of
13 interests in and under oil, gas or mining rights located in
14 New Mexico or fees, titles or contracts relating thereto, or
15 such sale or offer of such interests, wherever located, made
16 by an entity principally operating in New Mexico where:

17 (1) the total number of sales by any one
18 owner of interests, whether whole, fractional, segregated or
19 undivided, in any oil, gas or mineral lease, fee or title or
20 contract relating thereto, shall not exceed twenty-five,
21 provided that such sales shall be made only to persons meeting
22 suitability standards established by rule or order of the
23 director and that investors are provided with such disclosure
24 documents and other information as the director may require by
25 rule or order;

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1 (2) no use is made of advertisement or public
2 solicitation; and

3 (3) if such sale or offer is made by an agent
4 for such owner or owners, such agent shall be licensed
5 pursuant to the New Mexico Securities Act of 1986. No
6 commission shall be paid to an agent not licensed pursuant to
7 that act; and

8 U. a transaction pursuant to an offer to sell
9 securities of an issuer if:

10 (1) the transaction is part of an issue in
11 which there are no more than ten purchasers in this state
12 during any twelve consecutive months;

13 (2) no general solicitation or general
14 advertising is used in connection with the offer to sell or
15 the sale of the securities;

16 (3) no commission or other remuneration is
17 paid or given, directly or indirectly, to a person other than
18 a broker-dealer licensed or not required to be licensed
19 pursuant to the New Mexico Securities Act of 1986 for
20 soliciting a prospective purchaser in this state; and either

21 (4) the seller reasonably believes that all
22 of the purchasers in this state are purchasing for investment;
23 or

24 (5) immediately before and immediately after
25 the transaction, the issuer reasonably believes that the

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1 securities of the issuer are held by fifty or fewer beneficial
2 owners and the transaction is part of an aggregate offering
3 that does not exceed five hundred thousand dollars (\$500,000)
4 during any twelve consecutive months.

5 For the purposes of [~~this subsection~~] Subsection T of
6 this section, "principally operating in New Mexico" means a
7 corporation or limited liability company organized under the
8 law of this state, a corporation in which a majority in
9 interest of [~~whose~~] the shareholders are residents of this
10 state, a limited liability company in which a majority in
11 interest of the members are residents of this state, a
12 partnership in which a majority in interest of the partners
13 are residents of this state, a trust in which a majority in
14 interest of the beneficiaries are residents of this state or a
15 sole proprietorship in which the owner is a resident of this
16 state. "

17 Section 3. EFFECTIVE DATE. --The effective date of the
18 provisions of this act is July 1, 1998.

1
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3 **FORTY-THIRD LEGISLATURE**
4 **SECOND SESSION, 1998**
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8 **January 30, 1998**
9

10
11 **Mr. Speaker:**
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13 **Your RULES AND ORDER OF BUSINESS COMMITTEE, to**
14 **whom has been referred**
15

16 **HOUSE BILL 282**
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18
19 **has had it under consideration and finds same to be GERMANE**
20 **in accordance with constitutional provisions.**
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22 **Respectfully submitted,**
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R. David Pederson, Chairman

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Adopted _____
(Chief Clerk)

Not Adopted _____
(Chief Clerk)

Date _____

The roll call vote was 8 For 0 Against

Yes: 8

Excused: Gubbels, Hobbs, Nicely, Rodella, Ryan, Sanchez,
Williams, S.M

Absent: None

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